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# Supreme Court of the United States.

OCTOBER TERM, 1928.

No. 667.

WILLIAM ROSCHEN,

*Appellant,*

*against*

HAMILTON WARD, Attorney General of the State of New York; JOAB H. BANTON, District Attorney of New York County, New York, and WILLISTON W. BISSELL, HARLOW M. FULLER, THOMAS McBURNIE, WILLIAM L. COOK and FREDERIC A. WOLL, constituting The Board of Optometry Examiners of the State of New York,

*Appellees.*

No. 668.

S. S. KRESGE COMPANY,

*Appellant,*

*against*

HAMILTON WARD, Attorney General of the State of New York; JOAB H. BANTON, District Attorney of New York County, New York, and WILLISTON W. BISSELL, HARLOW M. FULLER, THOMAS McBURNIE, WILLIAM L. COOK and FREDERIC A. WOLL, constituting The Board of Optometry Examiners of the State of New York,

*Appellees.*

## REPLY BRIEF FOR APPELLANTS

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April 5, 1929.

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| WILLIAM ROSCHEN, Appellant, against HAMILTON WARD, Attorney General of the State of New York; JOAB H. BANTON, District Attorney of New York County, New York, and WILLISTON W. BISSELL, HARLOW M. FULLER, THOMAS McBURNIE, WILLIAM L. COOK, and FREDERIC A. WOLL, constituting The Board of Optometry Examiners of the State of New York, Appellees. | No. 657 |
| S. S. KRESGE COMPANY, Appellant, against HAMILTON WARD, Attorney General of the State of New York; JOAB H. BANTON, District Attorney of New York County, New York, and WILLISTON W. BISSELL, HARLOW M. FULLER, THOMAS McBURNIE, WILLIAM L. COOK, and FREDERIC A. WOLL, constituting The Board of Optometry Examiners of the State of New York, Appellees. | No. 668 |

## REPLY BRIEF FOR APPELLANTS.

### Answering Appellees' Point I.

Defendants state (p. 9 of their brief) that our point that the lenses are harmless in themselves and cannot possibly

do any injury was not argued or briefed below. It is true that a separate point heading was not made for the argument, but it was clearly part and parcel of plaintiff's case, because it showed that this legislation was *inspired* by selfish interests for selfish purposes, and not for the public welfare, for no harm could come from the use of *mere magnifying lenses.*

Thus at page 5 of our brief in the Statutory Court is found, *in italics*, this statement:

> "Convex spherical lenses are *mere magnifying glasses* (par. 9), *which cannot and do not injure the sight in any way* (par. 10)."

although the rest of the page is printed in ordinary type, without emphasis.

The point was orally argued before the Statutory Court. We quote from the typewritten transcript of the oral argument (p. 5).

> "These plaintiffs sell only one type of spectacle, and that is a spectacle fitted with magnifying glasses of different strength. They do not sell spectacles that will help a far-sighted man or a near sighted man or a man with a diseased eye, and their principal trade comes from the fact that all of us, as we pass forty years, undergo a change in our eyesight which is natural, physiological change in the eyesight and which is called presbyopia or, in plain English, old man's eyes; there is some change in the structure there which requires some assistance, and according to the figures, the vast majority—seventy-five per cent. of the people who wear glasses are simply what they call presbyopes and need nothing but this assistance, because they are not suffering from a disease of the eye, or any diseased condition at all but just from the condition commonly called old man's eyes."
>
> * * * * * * * *

(p. 7).

> Judge Hand: Do plain magnifying glasses have any effect upon the human eyes?

> Mr. Seligsberg: According to our report and investigations, we find that they do not."

The foundation laid in the record shows that the harmlessness of the sale and use of mere magnifying lenses stands substantially *uncontradicted*.

The conclusion that this legislation is unconstitutional on these facts is irresistible, for, if the sale and use of mere magnifying lenses is harmless, then the people of the State of New York were not and are not being injured by their use. If the people of the State are not being injured, how can this statute reasonably be said to bear a real and substantial relation to public health and safety? It does not bear such a relation, and it would not bear such a real and substantial relation even if its enactment had been urged by public-spirited organizations instead of parties with sinister motives.

## Answering Appellees' Point II.

Assuming that defendants' answer overrides the argument made above,—which is impossible, for the harmless character of mere magnifying lenses is not seriously contested,—defendants concede (p. 10) too much when they agree that Sec. 1432-A of the Education Law does not place upon plaintiffs any duty to precede each sale of spectacles with an examination, test or prescription. Such a concession leaves the statute indefensible, because it bears no real and substantial relation to public health and safety.

In what possible way does the presence of an optometrist or physician at or near a counter where spectacles are sold, or even the fact that he is in general charge of such a counter, help the public? The sale will be made under this absurd law *exactly as it is made to-day* and as described in the two complaints. A customer comes in, uses the test card, selects the spectacles from the sample card, picks out what he wants, pays for it, and goes out. How then does the statute protect the public merely by requiring that an optometrist be present in the store?

## Answering Appellees' Point III.

We invite attention to the serious inconsistency in defendants' brief. At page 10 it is stated:

> "If the seller does not provide such expert attendance and supervision he is liable to prosecution. *If he does provide such expert attendance and supervision he is not liable to prosecution, even though the expert makes or permits sales without requiring or suggesting the ordinary preliminary examination*". (Italics ours)

At page 18, defendants, seeking to justify the legislature's failure to place express affirmative duties on the optometrist, state:

> "Here is a peculiar reason, as the legislature may have considered, for supposing that an optometrist, placed in charge of a place where spectacles are sold, *will not remain quiescent* while imperfect goods are offered, while the victim of an obvious diseased condition goes unwarned, or while any goods are offered without the suggestion of an examination". (Italics ours)

Defendants obviously have not decided what the statute requires. Defendants' inconsistency is basic.

To say that this statute serves a purpose akin to those providing for the presence of matrons when female prisoners are searched, or for the presence of representatives of a tax department when a decedent's safe deposit box is opened, or forbidding the driving of automobiles by minors except under specific conditions, is to draw analogy into absurdity (See Appellees' Brief, pp. 15-16). The police matron is present to protect the prisoner and not the public; the tax representative is present to protect the government and no one else. The obvious purpose of the presence of the owner of a car when a minor is driving is undoubtedly to create a rule of civil liability. It is not a safety rule. It is no more safe to have a minor driving in the presence of an adult than to have him driving alone, but statutes of this kind assume that minors driving in certain localities do not endanger public

safety, but that, being minors, a responsibility must be created by the presence of the owner of the automobile.

Another astonishing argument by defendants is the suggestion that defendant, The State Board of Optometry Examiners (Brief, p. 18), will prosecute optometrists who work in stores and permit glasses to be sold without examination. The basis for the prosecution, it is asserted, will be rules which the Regents and the State Board of Optometry Examiners are expected to make for the purpose. Counsel in his commendable zeal forgets that not only in the State of New York but throughout the United States, administrative officers and bodies may only make rules in support of statutory enactments, *and not in amplification thereof*, and consequently his argument fails.

> *United States* v. *Antikamnia Co.*, 231 U. S. 654;
> *United States* v. *Grimaud*, 220 U. S. 506, 518;
> *Maryland Casualty Co.* v. *United States*, 251 U. S. 342.

In *United States* v. *Antikamnia Co.* (*supra*), this Court said, at pages 666-7:

> "The query then occurs, such being the words and purpose, if the quantity or proportion of the substances or any derivative or preparation of them must be stated, is it *administrative of the law or additive to it* to require by regulation that not only the name of the derivative or preparation be stated but from what substance derived or of what it is a preparation?" (Italics ours.)

See also:

> *Hampton* v. *United States*, 276 U. S. 394;
> *United States* v. *United Verde Co.*, 196 U. S. 207;
> *Waite* v. *Macy*, 246 U. S. 606;
> *Williamson* v. *United States*, 207 U. S. 425.

The law in New York is the same.

> *People* v. *Klinck Packing Co.*, 214 N. Y. 121;
> *Schumer* v. *Caplin*, 241 N. Y. 346, 351.

Defendants state (pp. 18-19) that "an optometrist selling glasses without first determining the visual acuity of the sufferer, or at least presenting to him the desirability of such an examination, would be guilty of malpractice". This is a patent confession that appellees fail to grasp the real point in this case, that is,—that the optometrist is *not* required to make the sale of spectacles. True, an optometrist *selling glasses* would have to make an examination to safeguard himself against malpractice suits, but under the statute in question the optometrist is *not required* to make the sale. Anybody, even an errand boy, may do so. Defendants' brief therefore begs the question.

One concluding word as to defendants' brief (p. 17), where they seek to justify the astonishing failure of the legislature to impose express affirmative duties on the optometrist whose employment will be compulsory under this drastic legislation. Defendants' argument is that no express affirmative duties need have been provided in the legislation, because the prohibition of sales at retail of spectacles and lenses for the correction of vision unless a duly licensed physician or duly qualified optometrist is in charge and personal attendance, "introduces a tendency" (p. 17) upon which the legislature might have relied, to expect that purchasers would be afforded expert and professional guidance in the selection of such aids to vision. This "tendency" upon which the legislature may have relied, according to defendants, is predicated upon two grounds: (1) that the optometrist would perform his duties because he has at stake his professional reputation; (2) if he fails to perform his duties his license may be revoked.

Just what these duties are is not stated. Defendants concede (Brief, pp. 10-11) that there is no duty on the part of the optometrist to precede each sale with an examination, test or prescription, and if the optometrist does not do one of these things, it is indeed hard to see just what his functions will be and what he must do to preserve his "professional reputation" or prevent the revocation of his license.

These theories of defendants are unwarranted assumptions, moreover, since we are dealing with a penal statute—where the language must clearly impose a duty, and which must be "strictly construed".

In the last analysis, the entire argument comes down to this: that the legislature of New York may have intended one thing, whereas in truth they accomplished an entirely different thing, by the enactment of the statute in question. It is laudable and proper to enact a statute which is designed really to safeguard and preserve the public health and general welfare, but the statute before the Court bears no real and substantial relation to those worthy purposes. It is conceived and designed not to benefit the public, but to benefit the optometrist. Its genesis is shrouded in iniquity. Its purpose is not to safeguard the public health but to cause optometrists to wax fat with large gains at the expense of the community in general. It bears no more real relation to the public weal than the statutes recently condemned by this Court in the *Liggett* and *Foster Fountain Packing Co.* cases.

**For these reasons, together with those advanced in our main brief, the decrees appealed from should be reversed, a preliminary injunction should be granted, and the cases restored for trial.**

Respectfully submitted,

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I. Maurice Wormser,
Counsel for Appellants.

New York, April 5, 1929.